SUPREME COURT, U. S.
73-1851
FILED
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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1973

IN RE: GRAND JURY SUBPOENA,
R. E. HUNTLEY COTTON COMPANY,
GIBSON F. HEMPHILL,
R. E. HUNTLEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioners, R. E. Huntley Cotton Company, Gibson F. Hemphill and R. E. Huntley, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on April 9, 1974.

OPINION BELOW

The opinion of the Court of Criminal Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of Texas.

JURISDICTION

The judgment of the Court of Appeals was entered April 9, 1974. A time Petition for Rehearing En Banc was denied on May 9, 1974, and this Petition was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the members of a two man brother-in-law general partnership may be denied their Fifth Amendment Rights to refuse to turn over their partnership records to a Federal Grand Jury, solely because of the scope of the business endeavor without regard to the scope of a membership of the partnership.

2. Whether the Court of Appeals by refusing to write an opinion on a case of first impression before such Court, has denied Petitioners the right of appeal and the right to effective counsel.

CONSTITUTIONAL PROVISIONS INVOLVED

Article V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

As reflected by the District Court's Order below, on December 20, 1973, Petitioners Hemphill and Huntley were found in contempt and remanded to the custody of the Mar-

shall for retention during the life of the Grand Jury or until such time of compliance with the trial court's order of December 18, 1973, for a full and complete response to certain Grand Jury subpoenas. Hemphill and Huntley timely appealed and the District Judge stayed his contempt order during the pendency of the appeal.

As a prelude to the contempt order, certain subpoenas duces tecum were issued by the Grand Jury in Wichita Falls, Texas, the same having been attached to Petitioners' Motions to Quash. Such motions raised the propriety of the subpoenas under Rule 17 (C), Federal Rules of Criminal Procedure, as well as the Fourth, Fifth and Ninth Amendments to the Constitution of the United States. The trial court's rulings were based upon the stipulations of the parties, the pleadings and memoranda, and the attached instruments and affidavits thereto. Such data reflect that Hemphill and Huntley, brothers-in-law, formed the general partnership of R. E. Huntley Cotton Company some six and one-half years ago. No other person owns any interest in such family partnership, the affairs are the same, being subject to the sole management, control and direction of Hemphill and Huntley. The documentation sought by the subpoenas comprised a great portion of all the records of such partnership. As reflected by the record stipulations, the two man partnership did a large gross volume in sales over an extensive area, with multi-million dollar assets, owned and operated other businesses, and employed some one hundred fifty-eight persons in various warehouses.

The Court of Appeals affirmed under its Local Rule 21 without written opinion after which Petitioners timely filed their Petition for Rehearing En Banc, further urging that such application of Local Rule 21, in violation of its purposes articulated in *NLRB v. Amalgamated Clothing Workers of America*, AFL-CIO (5th Cir., 1970), 430 F. 2d 966 denied these Petitioners' rights to appeal and to effective counsel under the Sixth Amendment to the Constitution of the United States, inter alia.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with this Court's decision in *United States v. White*, 322 U.S. 694 (1944).

At the threshold, there appears a certain burden the Government has failed to meet. If nothing more is shown than a traditional partnership and its books and records, such books and records fall within the privilege available to any or all of the partners. See the reasoning in *United States v. Cogan*, 257 F. Supp., 170, 172 (S.D., N.Y., 1966). This Court affirmed as recent as January 22, 1973, in *United States v. Dionisio*, ... U.S. ..., 35 L. Ed. 2d, 67, that "This is not to say that a Grand Jury subpoena is some talisman that dissolves all constitutional protections. The Grand Jury cannot require a witness to testify against himself. It cannot require the production by a person of private books and records that would incriminate him. See *Boyd v. United States*, 116 U.S. 616, 633-635." See also the reasoning of *Mr. Justice Frankfurter and Ullman v. United States*, 350 U.S. 422, 426, 427. The Government apparently relied upon two Third Circuit cases to encroach upon Petitioner's rights: In Re Mal Brothers Contracting Company, 444 F. 2d 615 (3rd Cir.) cert. denied, 404 U.S. 857 (1971); *United States v. Bally Manufacturing Corporation*, 345 F. Supp., 410 (Eastern District, Louisiana, 1972); and In Re Grand Jury (Isadore H. Bellis), 483 F. 2d, 961 (3rd Cir., 1973). Presumably, the Third Circuit opinions are grounded upon *United States v. White*, 322 U.S. 694, (1944). The test of White is necessarily two-pronged: (1) the scope and character of the membership and (2) the scope of the business. The Third Circuit Opinions, though possibly distinguishable, appear to ignore the first prong — a path that could lead to the denial of Fifth Amendment Rights to one individual whose business was sufficiently broad. Under such a theory, only a poor business man is assured of being clothed with the protection. This completely ignores the key to *White* as to whether or not the members involved belonged to "an institution which involves more than the private or personal

interest of its members." Id. at 701. Revisits to *White* have lead to the stressing of "representative capacity" of the person involved as opposed to one who owns the records and has a legally cognizable interest in them. See authorities cited in *Cogan* at 172-173.

It is submitted that the better rationale is that size alone is not sufficient to warrant treatment of the partnership as a corporation as to the self-incrimination privilege. Focus should be placed on the extent and nature of the ownership group. If this leads to the finding that the records are not kept in a representative capacity, but only for the personal and private business use of the general partners, the Fifth Amendment should not apply. This in fact is the holding of this Court in *White.*

2. The decision below raises significant problems concerning appellate procedure wherein appellants may be defined a definitive decision by arbitrary refusal to write on significant questions of law.

The Court of Appeals by its per curiam disposition of this cause under its Local Rule 21 misapprehended the use and purpose of Rule 21 so well articulated by Chief Judge John R. Brown in *NLRB v. Amalgamated Clothing Workers of America,* AFL-CIO (5th Cir., 1970) 430 F. 2d 966. Such Court by its misapplication effectively denied Petitioner's right to appeal in violation of their rights under the statutes of the United States and the Sixth Amendment to the Constitution of the United States. It is emphasized that this cause was presented to the Court of Appeals as a case of first impression in that circuit as to whether or not partners in a brother-in-law partnership were entitled to a Fifth Amendment privilege. Without regard to the decision taken by the United States Court of Appeals for the Third Circuit, as to such a significant issue, the bench and the bar, as well as the litigants were entitled to a judicial expression as to such a significant issue. As stated by Judge Brown in *Amalgamated,* at Page 972, "The Court recognizes that it

must — never apply the Rule to avoid making a difficult or troublesome decision or to conceal devisive or disturbing issues. This means that while Rule 21 should make a real contribution toward the goal of avoiding delays which can often amount to a denial of justice, it must be sparingly used." When, as here, an appellant has been effectively denied the right of review, such amounts to a use of Rule 21 never conceived nor appropriate to any system of justice. In this cause, there was a dire need for judicial expression. One should not deny a constitutional right of an appellant without telling him, the bench and the bar — why!

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Fifth Circuit.

Respectfully submitted,

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214/748-7078
Attorneys for Petitioners

June 5, 1974

CERTIFICATE OF SERVICE

I hereby certify that on this the 5th day of June, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Solicitor General, Counsel for Respondent, Department of Justice, Washington, D. C. 20530. I further certify that all parties required to be served have been served.

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EMMETT COLVIN,
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Dallas, Texas 75202
Attorneys for Petitioners

APPENDIX

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 74-1126

In the Matter of a Grand Jury Subpoena

In Re: R. E. HUNTLEY COTTON COMPANY,
GIBSON F. HEMPHILL & R. E. HUNTLEY,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(April 9, 1974)

Before GEWIN, GOLDBERG and CLARK, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK
MAY 9, 1974

600 CAMP STREET
NEW ORLEANS, LA. 70130

To All Counsel of Record

Re: No. 74-1126 — In Re: R. E. Huntley Cotton Co., et al v. U.S.A.

Gentlemen:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth
Clerk

By Susan B. Le Brun
Deputy Clerk

cc: Mr. Emmett Colvin
Mr. Jack Banner
Mr. Michael Carnes

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1851

IN RE GRAND JURY SUBPOENA

R.E. HUNTLEY COTTON COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUGGESTING MOOTNESS

On December 20, 1973, the individual petitioners, Gibson Hemphill and R.E. Huntley, were adjudged in civil contempt by the United States District Court for the Northern District of Texas, for their refusal to obey an order of the court directing them to produce before a grand jury subpoenaed financial records of petitioner R.E. Huntley Cotton Company, a partnership of which they are the only members; they were ordered detained in the custody of the United States Marshal until they complied with the order or until the term of the grand jury expired. The court stayed enforcement of the order pending an appeal to the court of appeals. On April 9, 1974, the court of appeals affirmed the order, and

on May 22, 1974, it declined to stay its mandate pending the filing of a petition for a writ of certiorari. On May 28, 1974, Mr. Justice Powell also denied a stay.

We have been advised by the United States Attorney that the district court thereafter stayed the contempt order pursuant to agreement by petitioners to produce the records called for; that petitioners have since produced most of the records without at any time having been in custody; and that on July 18, 1974, the term of the grand jury expired. Consequently, by the terms of the contempt order, the case is now moot. *E.g., St. Pierre* v. *United States,* 319 U.S. 41, 43; *Baldridge* v. *United States,* 406 F. 2d 526, 527 (C.A. 5); cf. *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 441-442.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.